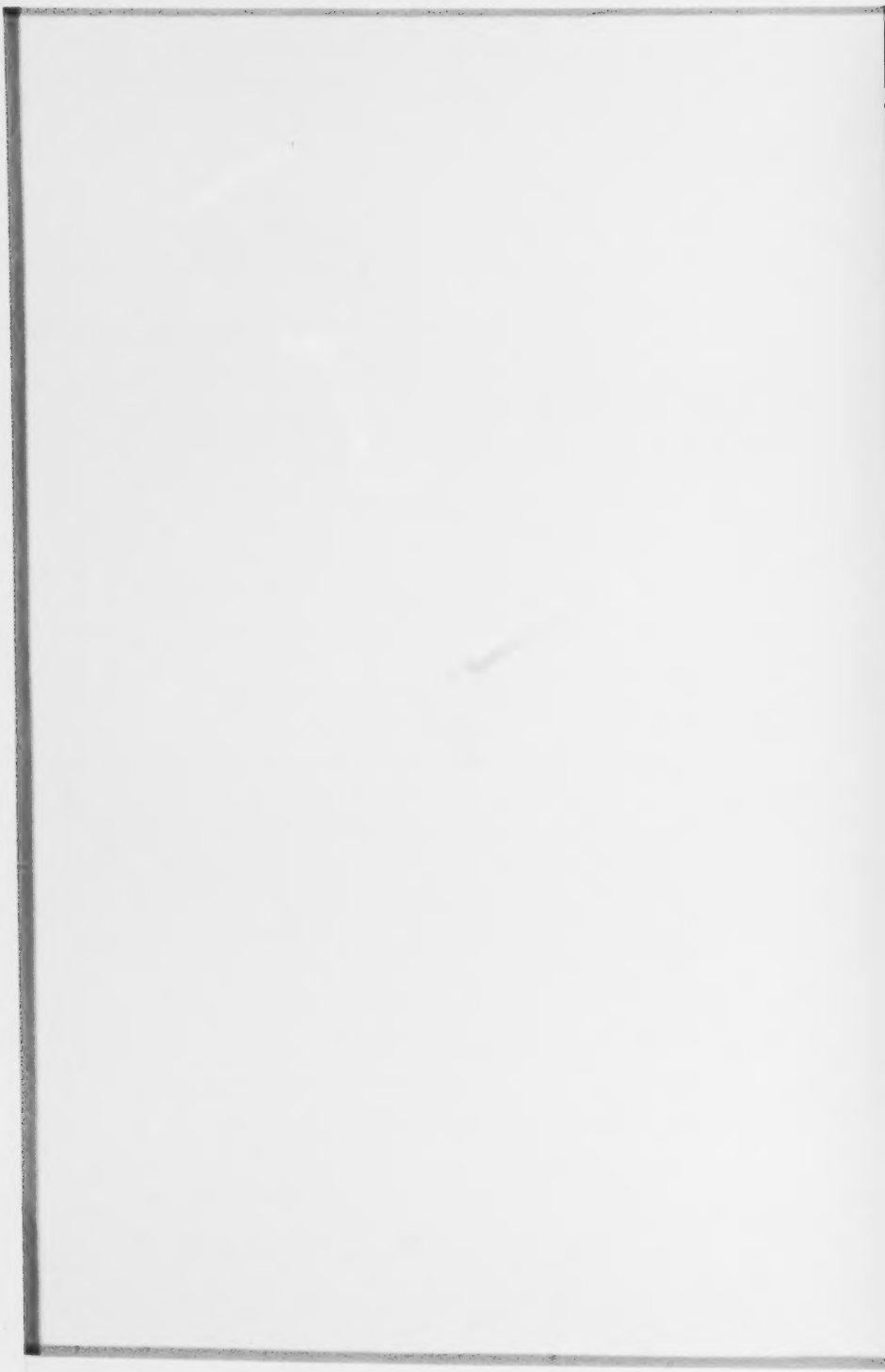

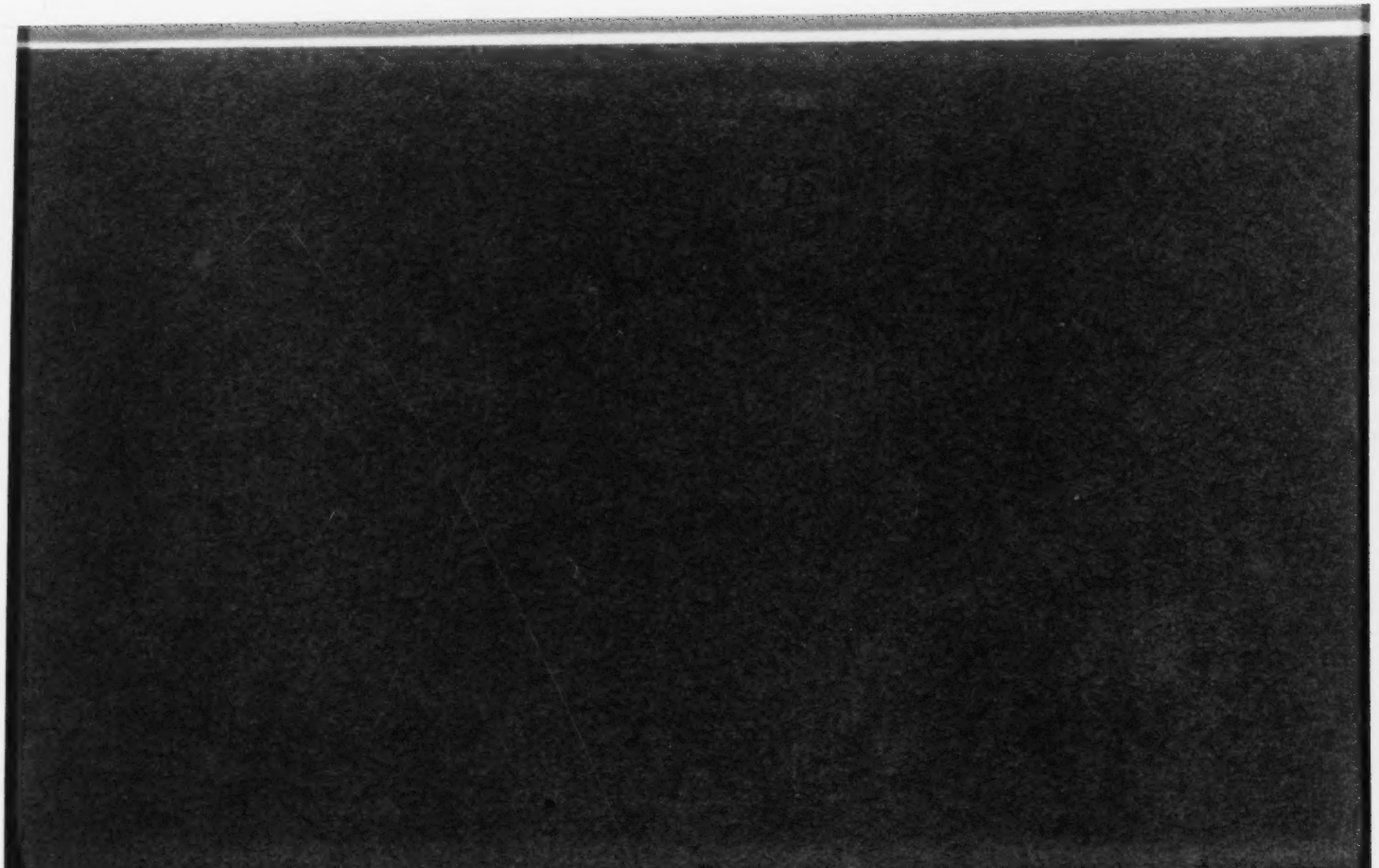

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 386

CONTINENTAL OIL COMPANY, A CORPORATION,
PETITIONER

v.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 294–313) is reported in 26 F. Supp. 694. The opinion of the Circuit Court of Appeals (R. 700–716) is reported in 113 F. (2d) 557.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 26, 1940 (R. 716). The petition for a writ of certiorari was filed on August 30, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the purported transfers of gasoline by the petitioner to its wholly owned subsidiary were ineffective to avoid the federal excise taxes assessed against the petitioner upon the subsequent sales of that gasoline.

STATUTES INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 617. TAX ON GASOLINE.
>
> (a) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.
>
> (b) If a producer or importer uses (otherwise than in the production of gasoline) gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this title be considered a sale.
>
> (c) As used in this section—
>
> (1) the term "producer" includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer.
>
> * * * * *

National Industrial Recovery Act of 1933, c. 90, 48 Stat. 195:

> SEC. 211. (a) Effective as of the day following the date of the enactment of this

Act, section 617 (a) of the Revenue Act of 1932 is amended by striking out "1 cent" and inserting in lieu thereof "1½ cents".

* * * * *

STATEMENT

This suit was brought by petitioner, Continental Oil Company, a Delaware corporation, hereinafter referred to as Continental, against the Collector of Internal Revenue to recover excise taxes in the amount of $699,131.82, with interest. The contested taxes were levied under the Revenue Act of 1932, which imposed an excise upon lubricating oil and gasoline sold by the "producer" thereof.

The findings of the District Court (R. 315–325), disclose the following facts:

Continental is, and was at all times material here, engaged in the business of producing, refining, and marketing petroleum and petroleum products (R. 315, 316).

On June 20, 1932, fourteen days after the enactment of the Revenue Act of 1932 and one day prior to the effective date of the excise tax imposed by that Act upon sales by producers of gasoline and lubricating oil, Continental transferred almost all of its finished inventory of gasoline and oil to two of its wholly owned subsidiaries (R. 315–316, 318). Continental's motive in effecting the transfers was to escape payment of the excise tax (R. 324). The taxes in controversy were collected upon the subsequent sale by the subsidiaries just as though Continental had made the sales directly without the interposition of the subsidiaries.

One of the subsidiaries, Continental Oil Company of Nevada, was a small dummy corporation which had been organized to protect the Continental name (R. 317). The petition for certiorari, however, does not seek review with respect to the taxes imposed on the sales of oil and gasoline routed through that subsidiary (Pet. 10), and in the circumstances we will not undertake to recount the many facts revolving around its activities and functions.

The second subsidiary was Conoco Oil Company of Delaware, hereinafter referred to as Conoco. It received from its parent, 18,407,760 gallons of gasoline on June 20, 1932, in the transaction mentioned above [1] (R. 315).

Conoco was organized in 1929 because another corporation had already registered the name of Continental in Illinois, Kentucky and Indiana, which Continental had unsuccessfully attempted to purchase from that corporation (R. 316–317). Conoco was dissolved in 1935, after Continental finally succeeded in purchasing the right to use its name in Conoco's territory (R. 319). Upon dissolution, Conoco simply became a district office of

[1] On June 17, 1933, immediately prior to the effective date of the increase of tax of one-half cent per gallon on sales of gasoline by producers under the National Industrial Recovery Act, Continental similarly transferred about 8,000,000 gallons of gasoline to Conoco under circumstances stipulated to be similar to the circumstances of the June 20, 1932, transaction (R. 316).

Continental, and the change from Conoco to the district office involved no change in personnel or facilities (R. 319).

The gasoline here in question remained physically present where it had been prior to the transfer, namely, in the possession of Great Lakes Pipe Line Company, hereinafter referred to as Great Lakes, a common carrier in which Continental was a large stockholder. The records of Great Lakes were not changed but still showed Continental as the owner, although it had been notified of the transfer. It regarded the transfer simply as an inter-company matter, and its procedure in handling and shipping the gasoline after June 20, 1932, was the same as it had been before (R. 317, 318, 319, 320).

Continental and Conoco had practically the same officers and board of directors. The same officers performed almost identically the same services for both companies. The main offices of both were together at Ponca City, Oklahoma (R. 317). The general books of both were kept by Continental employees in the accounting department of Continental (R. 322).

Notwithstanding the unusual character of the transaction, there was no meeting of Conoco's directors for the purpose of authorizing the transfer to it on June 20; but there was a bill of sale executed, which was unprecedented. The alleged ne-

gotiations as to the transfer were between persons who were officers of both companies. There was no discussion concerning the prices to be paid for the inventories (R. 318). Continental retained and exercised complete control of the inventories transferred on its books to Conoco (R. 324). Indeed, over 700,000 gallons of the gasoline transferred to Conoco were reacquired by Continental for its own purposes (R. 321).

Conoco was not in any financial position to purchase the gasoline transferred to it by Continental (R. 322, 323).

Continental and/or Conoco received an increased price for the gasoline to the extent of the federal excise tax, which was the same gross price that was received by its competitors who had paid the tax (R. 324–325).

The District Court found as a fact that the transfers to Conoco were merely bookkeeping transactions (R. 320), and were not bona fide; and that for the purpose of the excise tax Continental continued to be the owner of the gasoline in controversy (R. 324). It therefore denied recovery of the taxes paid upon Conoco's ultimate sales of the gasoline, since it treated those sales as having been made by Continental within the meaning of Section 617 (a) of the Revenue Act of 1932. The Circuit Court of Appeals affirmed.

ARGUMENT

The decision below is not in conflict with the decisions of any other circuit court of appeals [2] or with any decision of this Court. The issue is merely whether the peculiar facts in this case call for the application of the same principles which governed in *Higgins* v. *Smith,* 308 U. S. 473, and *Griffiths* v. *Commissioner,* 308 U. S. 355. Cf. *Taylor* v. *Standard Gas Co.,* 306 U. S. 307. The decision of the court below that those principles apply here was plainly correct and, in any event, presents no question for further review.

As pointed out by the court below (R. 708), the facts and circumstances show more than mere ownership of the stock of Conoco by Continental. They show domination, control, and participation in affairs of such kind and to such a degree as to prove conclusively that Conoco was no more than a subservient agency, utilized by the petitioner in a transaction which was admittedly for tax avoidance purposes. The purported transfer of the

[2] Indeed, the decision below is in line with the decisions in other circuits. Cf., e. g., *Campana Corp.* v. *Harrison* (C. C. A. 7th), decided August 14, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, par. 9642; *Albrecht & Son* v. *Landy* (C. C. A. 8th), decided August 19, 1940, not yet officially reported, but may be found in 1940 C. C. H., Vol. 4, par. 9649; *Mehrlust* v. *Higgins,* 112 F. (2d) 717 (C. C. A. 2d), pending on petition for a writ of certiorari, No. 316, October Term, 1940.

gasoline to such agency on the day before the excise tax became effective did not vary the control or change the flow of economic benefits. In such circumstances, the transaction must be dismissed from consideration for purposes of fixing the tax liability. *Higgins* v. *Smith, supra,* p. 476. The court below correctly concluded (R. 710–711) that in respect of liability for excise tax, the subsequent sales of the gasoline through Conoco were the legal equivalent of sales by the petitioner in its own right.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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